Office - Supreme Court, U.S.
FILED
APR 18 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1440

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN, and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPELLEES CHESTER G. ATKINS' AND DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS' MOTION TO DISMISS APPEAL AND TO AFFIRM JUDGMENT BELOW.

James Roosevelt, Jr.
James H. Wexler
Keith C. Long*
HERRICK & SMITH
100 Federal Street
Boston, Massachusetts 02110
(617)357-9000

Attorneys for Appellees
Chester G. Atkins and
Democratic State Committee
of Massachusetts

*Counsel of Record

QUESTIONS PRESENTED

1. Does this Court have appellate jurisdiction over this matter pursuant to 28 U.S.C. §1254(2) where the Court of Appeals upheld a state statutory scheme against an assertion that it was repugnant to the Constitution of the United States and where no substantial federal questions are presented?

2. Is Article Six, Section III of the Charter of the Massachusetts Democratic Party (the "15% Rule") 1/,

---

1/ Article Six, Section III of the Charter of the Democratic Party for the Commonwealth of Massachusetts (the "15% Rule"), adopted at the party's 1979 Charter Convention, provides for party endorsement of candidates through the mechanism of an election year Endorsing Convention. Endorsements are made by a majority vote of the delegates

(Footnote Continued)

which has previously been reviewed and upheld by this Court against Constitutional challenge in the

---

(Footnote Continuation)

1/ present and voting. However, candidates who, on any ballot, receive at least 15% of the votes cast at the Endorsing Convention for the office they seek and who otherwise meet the requirements of M.G.L. c. 53 may challenge that endorsement at the primary election. The candidate receiving a plurality of the votes cast at the Democratic primary becomes the Democratic nominee in the general election. M.G.L. c. 53, §2. The Massachusetts Supreme Judicial Court has construed the "15% Rule" as being incorporated into the state statutory scheme governing selection of the Democratic party nominees for statewide elective office. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d 443, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). (The text of Article Six, Section III is attached to this Motion as Appendix A, and a copy of the Massachusetts Supreme Judicial Court's opinion in Langone is attached as Appendix B.

case of Bellotti v. Connolly, 460 U.S. 1057 (1983), repugnant to the Constitution of the United States insofar as it applies to candidates for the Massachusetts Democratic Party's nomination for the office of United States Senator?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vii
INTRODUCTION.....	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	12
SUMMARY OF ARGUMENT.....	22
ARGUMENT.....	28
I. BECAUSE OF THE COURT OF APPEALS UPHELD A STATE STATUTORY SCHEME AGAINST CONSTITUTIONAL ATTACK, NO APPEAL LIES TO THIS COURT UNDER 28 U.S.C. §1254(2)..	28
II. WHATEVER FEDERAL QUESTIONS ARE PRESENTED BY THIS APPEAL AND INSUBSTANTIAL AND WERE CORRECTLY DECIDED BY THE COURT BELOW.....	30
A. Appellants' Arguments That The "15% Rule" Violates The First And Fourteenth Amendments And Article I §4 Of The United States Constitution Have Been	

Conclusively Resolved Against Them By The Decisions Of The Massachusetts Supreme Judicial Court And This Court In Langone v. Secretary Of The Commonwealth..... 30

(i) The "15% Rule" is a lawful exercise of the party's constitutionally protected right of association..... 31

(ii) The "15% Rule" does not violate Article 1, §4 of the United States Constitution.... 34

(iii) The "15% Rule" does not infringe any of appellants' First or Fourteenth Amendment rights..... 36

B. Appellants' Remaining Arguments Are Likewise Without Merit..... 44

(i) The "15% Rule" does not add any "qualification" to those enumerated in Article 1, §3 of the United States

Constitution and thus does not violate its provisions..... 44

(v) The "15% Rule" does not violate the Seventeenth Amendment..... 48

CONCLUSION..... 50

APPENDIX.....

Charter of the Massachusetts Democratic Party, including Article Six, Section III..... App.A

Langone v. Secretary of the Commonwealth, 388 Mass. 185, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983)..... App.B

Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984)..... App.C

Opinion of the Justices, 385 Mass. 1201, 434 N.E.2d 960 (1982). App.D

Additional Statutory Provisions..... App.E

TABLE OF AUTHORITIES

CASES — Page

Abrams v. Reno, 452 F. Supp. 1166 (S.D. Fla. 1978), aff'd. 649 F.2d 342 (5th Cir. 1981), cert. denied 455 U.S. 1016 (1982)... 35

Bellotti v. Connolly, 460 U.S. 1057 (1983)..... iii, 9, 10, 24, 31, 32

Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1981), cert. denied 404 U.S. 1019 (1972)... 41

Brown v. Ohio, 432 U.S. 161 (1977)..... 26, 29

Bullock v. Carter, 405 U.S. 134 (1972)..... 36

Clark v. Rose, 379 F. Supp. 73 (S.D.N.Y. 1974) (three judge court), aff'd. 531 F.2d 56 (2d Cir. 1976)..... 25, 35, 40

Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1082)..... 36, 37, 38

Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976) (three judge court)..... 38

Cousins v. Wigoda, 419 U.S. 477 (1975)..... 32, 33

CASES (cont'd.) Page

Davis v. Hildebrant, 241 U.S. 565 (1916)..... 35

Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981)..... 32, 33

Harris v. Conradi, 675 F.2d 1212 (11th Cir. 1982)..... 25, 35

Hicks v. Miranda, 422 U.S. 332 (1974)..... 24

Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-MC, Memorandum and Order Denying Preliminary Injunction (D. Mass., July 7, 1982) (three judge court)..... 6

Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-MC, Memorandum and Order Denying Preliminary Injunction (D. Mass., July 7, 1982)..... 6

Hopfmann, et al. v. Connolly, et al., United States Supreme Court, Case No. A-18, ORDER dated July 8, 1982 (Brennan, J.)..... 6

Hopfmann, et al. v. Connolly, et al., United States Supreme Court, Case No. A-18, ORDER dated July 9, 1982 (Rehnquist, J.)..... 7

CASES (cont'd.) Page

In re Hopfmann, United States Supreme Court, Case No. 82-488, ORDER dated October 18, 1982 (by the Court) (51 U.S.L.W. 3298).... 7

In re Hopfmann, United States Supreme Court, Case No. 82-610 (A-388), ORDER dated October 26, 1982 (Brennan, J.)..... 8

In re Hopfmann, United States Supreme Court, Case No. 82-610 (A-388), ORDER dated November 1, 1982 (by the Court) (51 U.S.L.W. 3339)..... 8

In re Hopfmann, United States Supreme Court, Case No. 82-610, ORDER dated November 5, 1982 (by the Court)..... 8

In re Hopfmann, United States Supreme Court, Case No. 82-610, ORDER dated November 29, 1982 (by the Court) (51 U.S.L.W. 3403).... 7

Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-MC, Memorandum and Order dismissing plaintiffs' Complaint (D. Mass., April 9, 1984)..... 11

Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984)..... 11

Jenness v. Fortson, 403 U.S. 431 (1971)..... 39, 40, 47

CASES (cont'd.) Page

Kolender v. Lawson, 461 U.S. 352 (1983)..... 26, 29

Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d 43 app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057(1983)..... passim

Lubin v. Panish, 415 U.S. 709 (1974)..... 37

Moritt v. Rockefeller, 346 F. Supp. 34 (S.D.N.Y. 1972) (three-judge court), aff'd. 409 U.S. 1020 (1972)..... 41

Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976) (three-judge court), aff'd. 429 U.S. 989 (1976)..... 38

Opinion of the Justices, 385 Mass. 1201, 434 N.E.2d 960 (1982)..... 12, 22, 33

Ray v. Blair, 343 U.S. 214 (1952)..... 32, 33

Restivo v. Conservative Party, 391 F. Supp. 813 (S.D.N.Y. 1975)..... 40

Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) (en banc), cert. denied 424 U.S. 933 (1976)..... 41

CASES (cont'd.) — Page

Rodriquez v. Popular Democratic Party, 457 U.S. 1 (1982)..... 32, 33

Rosario v. Rockefeller, 410 U.S. 752 (1973)..... 40, 47

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1982)..... 26, 29

Smiley v. Holm, 285 U.S. 355 (1932)..... 25, 34

State v. Crane, 197 P.2d 864 (Wyo. 1948)..... 46

Storer v. Brown, 415 U.S. 724 (1974)..... 39, 40, 47

Tansley v. Grasso, 315 F. Supp. 513 (D. Conn. 1970) (three-judge court)..... 16, 35, 39

Walker v. Yucht, 352 F. Supp. 85 (D. Del. 1972) (three-judge court)..... 36, 37, 38

STATUTES

28 U.S.C. §1254(2)..... 1, 26, 28, 29
42 U.S.C. §§1973, et seq..... 5
M.G.L. c.52, §10..... 2
M.G.L. c.53, §2..... 12
M.G.L. c.53, §6..... 2, 19, 43
M.G.L. c.53, §9..... 2, 13, 47
M.G.L. c.53, §37..... 2, 12
M.G.L. c.53, §38..... 2, 13
M.G.L. c.53, §44..... 14, 47
M.G.L. c.53, §46..... 2, 14, 47
M.G.L. c.53, §48..... 2, 13, 47
M.G.L. c.54, §116..... 2, 19, 43

STATUTES (cont'd.) **Page**

M.G.L. c.54, §116A..... 2, 20, 43

CONSTITUTIONAL PROVISIONS

United States Constitution,
Article I, §3... 26, 27, 42, 44, 45, 46
United States Constitution,
Article I, §4..... 24, 25, 30, 31, 34
United States Constitution,
1st Amendment..... 23, 30
United States Constitution,
14th Amendment..... 23, 30
United States Constitution,
17th Amendment..... 26, 42, 48, 50

RULES

Rule 16 of the Rules of the Supreme
Court of the United States..... 1

OTHER AUTHORITIES

Article Six, Section III of
the Charter of the Massachusetts
Democratic Party..... passim

Developments in the Law:
Elections, 88 Harv. L. Rev.
1111 (1975)..... 34, 36, 37

INTRODUCTION

Pursuant to Rule 16 of the Rules of this Court, appellees Chester G. Atkins (Chairman of the Massachusetts Democratic Party) and the Democratic State Committee of Massachusetts hereby move that the appellants' Appeal be dismissed and that the judgment of the United States Court of Appeals for the First Circuit be affirmed on the ground that it is plainly correct and the questions presented by the Jurisdictional Statement are so insubstantial as not to warrant further argument. Insofar as appellants' papers are treated as a Petition for Certiorari, these appellees oppose that Petition and request that this submission be treated in the alternative as a Brief in Opposition to the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the state statutory and federal Constitutional provisions cited by appellants, M.G.L. c. 52, §10; M.G.L. c. 53, §§6, 9, 37, 38, 46 and 48; M.G.L. c. 54, §§116 and 116A; and Article Six, Section III of the Charter of the Massachusetts Democratic Party were also involved in the decision below. The pertinent texts of these additional provisions of the state statutory scheme for nomination and election of candidates for state-wide office are set forth in Appendix A and Appendix E.

STATEMENT OF THE CASE

On June 4, 1982, appellants Alwin Hopfmann, a candidate for the Democratic Party nomination for the

office of United States Senator from Massachusetts, and registered voters Gregory Hession, Clarence Perkins, Clarence Paulin and Beth Sullivan ("appellants"), filed a five-count Complaint against defendants Michael G. Connolly, Secretary of the Commonwealth of Massachusetts; Francis X. Bellotti, Attorney General of the Commonwealth; Chester G. Atkins, Chairman of the Democratic State Committee of Massachusetts; and the Massachusetts Democratic State Committee ("appellees") in the United States District Court for the District of Massachusetts. Appellants' Complaint, challenging the validity and effect of the Massachusetts Democratic Party's "15% Rule" on federal and state constitutional and statutory

grounds sought declaratory and injunctive relief requiring Secretary Connolly to place Hopfmann's name on the September 14, 1982 Democratic Party state primary ballot as a candidate for the Democratic Party's nomination for the office of United States Senator.

On June 16, 1982, Attorney General Bellotti moved to dismiss or stay the proceedings below pending the decision of the Massachusetts Supreme Judicial Court in the related proceeding of Langone v. Secretary of the Commonwealth, SJC Case No. 82-214. 2/

2/ Langone v. Secretary of the Commonwealth was decided on July 9, 1982 and the Supreme Judicial Court's opinion in that case was later reported at 388 Mass. 185, 446 N.E.2d 443 (1983) [Appendix B].

That motion was granted on June 21. On June 22, 1982, at appellants' request, the District Court directed that a three-judge court be convened to hear and decide appellants' claims under the Voting Rights Act, 42 U.S.C. §§1973, et seq., concurrently with the District Court's consideration of appellants' other claims. On June 24, 1982, Atkins and the Committee filed answers as well as a motion to dismiss. On June 30, 1982, Secretary Connolly likewise filed an answer and a motion to dismiss.

On June 29, 1982, appellants filed a motion for a temporary injunction requiring Secretary Connolly to place Hopfmann's name on the Democratic primary ballot. After briefing by all parties, oral argument,

and the submission of the Statement of Agreed Facts from Langone v. Secretary of the Commonwealth, supra, the three-judge panel and the District Court below (as single judge) both denied the appellants' motion on the ground that appellants did not have the requisite "reasonable prospect of success" on any of their claims. Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-Mc, Memoranda and Orders entered July 7, 1982. On July 8, 1982, appellants filed an application in this Court seeking a stay of these denials of preliminary relief and an order directing Secretary Connolly to place Hopfmann's name on the Democratic primary ballot. That application was denied by Justice Brennan on July 8, 1982 and, after resubmittal by appellants, denied by Justice Rehnquist

on July 9, 1982. Hopfmann, et al. v. Connolly, et al., United States Supreme Court, Case No. A-18 (1982).

On September 20, 1982, appellants filed a petition for writ of habeas corpus in this Court requesting that Hopfmann's name be placed on the Democratic primary ballot. That petition was denied by the full Court on October 18, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-488, 51 U.S.L.W. 3298 (1982). On September 30, 1982, appellants filed a petition for writ of prohibition and/or mandamus and/or injunction in this Court, once again requesting that Hopfmann's name be placed on the Democratic primary ballot. That petition was denied by this Court on November 29, 1982. In re Hopfmann, United States Supreme Court, Case No.

82-610, 51 U.S.L.W. 3403 (1982). On October 25, 1982, appellants filed an application in this Court seeking a stay of the general election or, in the alternative, a special primary election, which was denied by Justice Brennan on October 26, 1982, and, after resubmittal, again denied, this time by the full Court, on November 1, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-610 (A-388), 51 U.S.L.W. 3339 (1982). Appellants' applications to this Court to enjoin the Governor of Massachusetts from certifying the election of Senator Edward M. Kennedy and the United States Senate from seating him were denied by this Court on November 5, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-610 (1982). On September 30, 1982, the District Court

denied appellees' renewed motions to dismiss, without prejudice to their renewal at a later date in light of developments in other courts. 3/ On October 26, 1982, appellants filed a renewed motion for preliminary relief in the District Court and, on November 3, 1982, a motion for summary judgment.

A copy of the opinion of the Massachusetts Supreme Judicial Court in the related case of Langone v. Secretary of The Commonwealth, 388 Mass. 185, 446 N.E.2d 43 (1983), was filed with the District Court on February 23, 1983, and a copy of this Court's

---

3/ An appeal from the Supreme Judicial Court's July 9, 1982 decision in Langone v. Secretary of the Commonwealth, supra, was then pending in this Court. This Court later dismissed that appeal for failure to present any substantial federal questions. Bellotti v. Connolly, 460 U.S. 1057 (1983).

dismissal of the appeal and denial of the alternative petitions for certiorari in that case (Bellotti v. Connolly, 460 U.S. 1057 (1983)), was filed with the District Court on April 8, 1983. Shortly thereafter, appellees Atkins, Secretary Connolly and the Committee filed renewed motions to dismiss.

On February 9, 1984, appellants Hopfmann and Sullivan filed a new action in the District Court below seeking to have the "15% Rule" applied to all candidates for statewide political office and for President of the United States, regardless of party affiliation. Hopfmann, et al. v. Connolly, et al., Civil Action No. 84-393-Mc. Defendants in that case moved to dismiss the Complaint.

On April 9, 1984, deciding both cases together and treating

appellees' motions to dismiss as motions for summary judgment, the District Court granted appellees' motions and dismissed both of appellants' Complaints. Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-Mc. Appellants then appealed this case to the First Circuit Court of Appeals. The District Court's judgment in Civil Action No. 84-393-Mc was not appealed. On October 22, 1984 the First Circuit affirmed the judgment of the District Court. Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984). Appellants' petition for rehearing was denied by the full bench of the First Circuit on December 10, 1984. Appellants' Notice of Appeal to this Court was filed on March 8, 1985 and their Jurisdictional Statement on March 11.

STATEMENT OF THE FACTS

By statute, the winner by a plurality of the votes cast in the Democratic primary becomes the Democratic Party nominee at the general election. M.G.L. c. 53, §2. Also by statute, voting at the Democratic primary is open not only to enrolled party members, but also to unenrolled or independent voters who declare themselves "Democrats" at the polls just before receiving ballots. M.G.L. c. 53, §37. 4/. These voters may then cancel or change their party registration at the polling places immediately after voting. M.G.L. c. 53, §38. Thus, it is possible for a voter to be only a one-time "primary day Democrat" and have

---

4/ As of February 1980, 39.9% of all registered Massachusetts voters were unenrolled. Opinion of the Justices, 385 Mass. 1201, 1205, 434 N.E.2d 960, 962 (fn. 1) (1982).

no other affiliation or desire for affiliation with the Democratic Party. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 193, 446 N.E.2d 43, 47 (1983).

Candidates seeking to have their names placed on the Democratic primary ballot for statewide office must satisfy several statutory requirements. The candidate must be an enrolled Democrat, M.G.L. c. 53, §48; file a financial disclosure form with the State Ethics Commission, M.G.L. c. 53, §9; submit nomination papers signed by at least 10,000 registered voters who can be either Democrats or independents, M.G.L. c. 53, §44, M.G.L. c. 53, §46; and comply with all party rules governing primary ballot access that neither defeat the purpose of a primary election nor violate the constitutional

rights of candidates or voters. Langone, supra, 388 Mass. at 194, 446 N.E.2d at 48. As observed by the Massachusetts Supreme Judicial Court, absent the "15% Rule", nothing in the statutory scheme would prevent a candidate who lacked the support of a single registered Democrat from being placed on the Democratic primary ballot and, notwithstanding little or no support from the regular party membership, from potentially becoming the Democratic Party candidate in the general election. Langone, supra, 388 Mass. at 191, 446 N.E.2d at 46.

Concerned with the decline of the party's organizational effectiveness and, in particular, with the fact that the then-existing statutory scheme allowed a candidate who did not share the party's ideals, had no intention of

furthering those ideals if elected, and had no party accountability, to run for office as the official Democratic Party nominee, the Democratic Party in 1977 appointed a Commission to draft a proposed state party Charter. The Commission held seven public meetings across the Commonwealth and, in the spring of 1979, submitted a proposed Charter to a specially convened Charter Convention. The delegates to the Charter Convention were elected at caucuses on March 24, 1979, conducted in every ward and town in the Commonwealth. All registered Democrats were eligible to take part in those caucuses, which were conducted on a "one Democrat, one vote" basis, and approximately 30,000 party members so participated.

A key provision of the Charter

proposed by the Commission concerned the procedure by which the party would choose its nominees for statewide office. Following the model so successfully used (and upheld) in Connecticut, see Tansley v. Grasso, 315 F.Supp. 513 (D.Conn. 1970) (three judge court, the Commission recommended that party nominees for statewide office be selected by a two-pronged procedure involving convention endorsement and the primary election. This procedure was set forth in Article Six, Section III, of the proposed Charter. Under this initially proposed version of Article Six, Section III, an Endorsing Convention, to be held in statewide election years, would, by majority vote, formally endorse one candidate for each statewide office. However, the Convention "endorsement" of a candidate

could be challenged at the state party primary by any and all other candidates, otherwise qualified under state law, who, on any Convention ballot, received at least 20% of the votes cast for that office. The party would thus be assured that its ultimate nominee had demonstrated at least a minimal degree of support from the regular party membership, in addition to the broad appeal to all voters who consider themselves Democrats which is needed to win the primary election. At the same time, the rights of significant minorities in the Party would be protected by their candidates being able to take their case directly to the primary voters through the "challenge" procedure, thus ensuring an open and democratic choice.

The Charter Convention debated

Article Six, Section III -- including its proposed "20%" requirement -- and, at the November 1979 continuation of the Convention, adopted the overall procedure of convention endorsement and primary selection, but struck a slightly different balance. The requirement that a candidate desiring to run in the primary obtain at least 20% of the votes for the office sought on any ballot at the Endorsing Convention was reduced to 15% of any such vote. The "15% Rule", as it came to be known, was then adopted by a roll-call vote of over two-thirds of the voting delegates. The overall Charter, as amended, was likewise adopted by an over two-thirds roll-call vote.

Under the terms of the Charter, any of its provisions could be amended at any State Convention by

majority vote. Article Six, Section III and its "15% Rule" were reaffirmed at the Party's April 11, 1981 Issues Convention and, in December, 1981, the Party issued its "Preliminary Call to Convention" which gave clear notice that the Party would be holding its 1982 Endorsing Convention pursuant to Article Six. Langone, supra, 388 Mass. at 198, 446 N.E.2d at 50 (fn.6).

Any candidate, including Hopfmann, who was dissatisfied with the "15% Rule" could have declared himself an "unenrolled" candidate and attempted to qualify for the general election ballot as an independent at any time prior to February 4, 1982. M.G.L. c. 53, §6. Likewise, any such candidate was free at all times to conduct a "write in" campaign for the general election. M.G.L. c.54 §§116, 116A.

Hopfmann pursued neither option.

On February 6, 1982, delegates to the 1982 Endorsing Convention were elected on a "one Democrat, one vote" basis at caucuses conducted in every ward and town throughout Massachusetts. Persons registered as Democrats prior to December 31, 1981, were eligible to take part in those February 6 caucuses and approximately 100,000 Democrats so participated. The Endorsing Convention was duly held on May 21-22, 1982, and candidates were endorsed for every statewide office. Two amendments seeking either to repeal Article Six, Section III or postpone its effective date until January 1, 1983, were presented, debated and overwhelmingly defeated. Michael Dukakis was endorsed for Governor, Evelyn Murphy for Lieutenant Governor, and Edward Kennedy

for United States Senator. Both of the candidates for the Party's nomination for Governor, five of the seven candidates for the Party's nomination for the Lieutenant Governorship, and one of the two candidates for the Party's nomination for United States Senator, received at least 15% of the Convention votes on one or more ballots for that office and were thus eligible to run in the primary. Hopfmann did not receive 15% of the Convention vote on any ballot for the office of Senator and, consequently, was ineligible. In accordance with the guidance provided by an advisory opinion of the Massachusetts Supreme Judicial Court, Opinion of the Justices, 385 Mass. 1201, 434 N.E.2d 960 (1982), Secretary Connolly did not print Hopfmann's name on the Democratic primary ballot.

The Democratic primary was duly held on September 14 and the General Election on November 2, 1982.

SUMMARY OF ARGUMENT

Because the First Circuit upheld a state statutory scheme against federal constitutional attack, and because appellants have presented no substantial federal questions to this Court, appellants' appeal must be dismissed for want of jurisdiction. To the extent their papers are treated as a petition for certiorari, that petition should be denied for lack of merit.

In its comprehensive and well-reasoned unanimous opinion in Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E.2d. 43, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983), the Massachusetts Supreme

Judicial Court, affirmed by this Court, conclusively resolved all but two of the arguments which appellants now bring to this Court. Specifically, the Supreme Judicial Court held that the "15% Rule" was a lawful exercise of the Democratic Party's constitutionally protected right of association; that it was a valid addition to the statutory requirements of M.G.L. c. 53 and was to be enforced by the state as part of that statutory scheme; and that it did not infringe any of the First or Fourteenth Amendment rights of candidates or their supporters. The correctness of these rulings, each directly applicable to appellants' claims in this appeal, was demonstrated by this Court's 6-3 decision dismissing the Langone plaintiffs' appeal "for want of jurisdiction", i.e. for want of a

substantial federal question. Bellotti v. Connolly 460 U.S. 1057 (1983). A dismissal of an appeal for want of a substantial federal question is a decision on the merits -- an affirmance of the correctness of the lower court's decision. Hicks v. Miranda, 422 U.S. 332, 343-44 (1974). As such, this Court's decision in Bellotti is dispositive of appellants' First and Fourteenth Amendment claims.

The Supreme Judicial Court's holding in Lanqone, supra, construing M.G.L. c. 53 as a matter of state law, likewise conclusively resolves appellants' Article I, §4 and appellate jurisdictional arguments against them. Under Article I, §4, the "legislature" of a state -- held by this Court to mean the entire state law-making process as construed by that state, Smiley v. Holm,

285 U.S. 355 (1932) -- may regulate the "time, place, and manner" of elections for the office of United States Senator. The state lawmaking process may constitutionally include political party rules and procedures so long as the party rules so adopted do not otherwise infringe a candidate's constitutional rights. Clark v. Rose, 379 F.Supp. 73 (S.D.N.Y. 1974) (three judge court), aff'd. 531 F.2d 56 (2d. Cir. 1976). See also Harris v. Conradi, 675 F.2d 1212, 1216 (11th Cir. 1982). As the Massachusetts Supreme Judicial Court ruled in Langone, the Massachusetts statutory scheme includes the "15% Rule". Langone, supra, 388 Mass. at 195-96; 446 N.E.2d at 48-49. This Court is bound by the Supreme Judicial Court's interpretation of the meaning of Massachusetts statutes.

Kolender v. Lawson, 461 U.S. 352 (1983); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Brown v. Ohio, 432 U.S. 161, 168 (1977). Because the First Circuit upheld this state statutory scheme as conclusively interpreted by the state's highest court against appellants' federal constitutional attack, no appeal lies to this Court under 28 U.S.C. §1254(2).

Appellants' two remaining arguments, that the "15% Rule" violates Article I, §3 of the United States Constitution and/or the Seventeenth Amendment, are likewise without merit. Contrary to appellants' assertions, the "15% Rule" does not add any "qualification" to those enumerated in Article I, §3; it merely states an eligibility requirement for candidates who seek the Democratic Party's

nomination for that office. A candidate may be elected to that office without being the Democratic Party nominee, and thus not subject to the "15% Rule", by running as an independent, as the candidate of another party, or by waging a successful "write-in" campaign. Langone, supra, 388 Mass. at 197-98, 446 N.E.2d at 50-51. For the same reasons, appellants' Seventeenth Amendment argument fails. The "15% Rule" does not change the "qualifications" of voters for the office of United States Senator or "dilute" their votes in any way. It applies equally to each Democratic party candidate for state-wide office; and every such candidate has a precisely equal opportunity to obtain delegate support.

ARGUMENT

I. BECAUSE THE COURT OF APPEALS UPHELD A STATE STATUTORY SCHEME AGAINST CONSTITUTIONAL ATTACK, NO APPEAL LIES TO THIS COURT UNDER 28 U.S.C. §1254(2).

Under 28 U.S.C. §1254(2), this Court has appellate jurisdiction over rulings of the Circuit Courts of Appeal only where the party appealing relied on a state statute held by the Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. Such is not the case here; indeed, the truth is quite the opposite. Contrary to appellants' arguments, in upholding the "15% Rule" -- which the Massachusetts Supreme Judicial Court has explicitly held to be part of the state statutory scheme for nominating state-wide Democratic candidates, Langone v. Secretary of Commonwealth, supra -- the First Circuit

upheld the state statutory scheme against appellants' Constitutional attack. The Supreme Judicial Court is the "final judicial arbiter" of the meaning of Massachusetts statutes, and its rulings on such questions are binding on this Court. Kolender v. Lawson, 461 U.S. 352 (1983); Schad v. Bureau of Mount Ephraim, 452 U.S. 61 (1982); Brown v. Ohio, 432 U.S. 161, 168 (1977).

The ruling of the Court below thus upheld a state statutory scheme against appellants' allegation that that scheme was repugnant to the United States Constitution. No appeal lies from such a determination under 28 U.S. §1254(2).

II. WHATEVER FEDERAL QUESTIONS ARE PRESENTED BY THIS APPEAL ARE INSUBSTANTIAL AND WERE CORRECTLY DECIDED BY THE COURT BELOW.

A. Appellants' Arguments That The "15% Rule" Violates The First And Fourteenth Amendments And Article 1, §4 Of The United States Constitution Have Been Conclusively Resolved Against Them By The Decisions Of The Massachusetts Supreme Judicial Court And This Court In Langone v. Secretary Of The Commonwealth.

Two of the arguments which appellants attempt to assert in this appeal -- that the Massachusetts Democratic Party had no constitutionally protected right to adopt the "15% Rule", and that appellants' First and Fourteenth Amendment rights were infringed by enforcement of the Rule -- have already been reviewed and rejected on their merits by this Court in the related case of Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446

N.E.2d 443, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983), and appellants' further argument based on Article 1, §4 has been conclusively resolved against them by the Massachusetts Supreme Judicial Court's interpretation of M.G.L. c. 53, as set forth in the Lanqone case. Appellants' arguments on those issues are thus without merit.

(i) The "15% Rule" Is a Lawful Exercise of the Party's Constitutionally Protected Right of Association.

In their Jurisdictional Statement, appellants argue that the Massachusetts Democratic Party had no constitutionally protected right to adopt the "15% Rule". That argument has conclusively been rejected by this Court in its 6-3 decision dismissing the appeal in the related case of Bellotti

v. Connolly, supra. In the Bellotti case, the Bellotti plaintiffs challenged the "15% Rule" on precisely the same grounds asserted by appellants here - that the Democratic Party had no First Amendment right of association justifying its adoption of the "15% Rule". Appellants' argument is not only wrong; given this Court's opinion in Bellotti, it is frivolous.

Even prior to its decision in Bellotti, the fundamental right of political parties to establish candidate selection procedures was repeatedly recognized by this Court. Rodriquez v. Popular Democratic Party, 457 U.S. 1, 14 (1982); Democratic Party v. Wisconsin, 450 U.S. 107, 122-24 (1981); Cousins v. Wigoda, 419 U.S. 477, 491 (1975); and Ray v. Blair, 343 U.S. 214 (1952). As noted by the Massachusetts Supreme

Judicial Court in its April 1982 advisory opinion regarding the "15% Rule":

> A determination of who will appear on a general election ballot as a candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest implicit in its freedom of association to ensure that party members have an effective role in that decision.

Opinion of the Justices, 385 Mass. 1201, 1204, 434 N.E.2d 960, 962 (1982).

This Court, time and again, has recognized the Constitutional right of a political party to protect its candidate selection process from undue influence by persons who are, at best, "election day" party members or who are not party members at all. See Rodriquez v. Popular Democratic Party, supra; Democratic Party v. Wisconsin, supra; Cousins v. Wigoda, supra; and Ray v.

Blair, supra. See also, Abrams v. Reno, 452 F.Supp. 1166 (S.D. Fla. 1978) aff'd. 649 F.2d 342 (5th Cir. 1981), cert. denied 455 U.S. 1016 (1982); Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1210 (1975). These principles were correctly applied by the Court below.

(ii) The "15% Rule" Does Not Violate Article I, §4 Of The United States Constitution.

Article I, §4 of the United States Constitution is an affirmative grant of power to the states and not, by itself, a limit on the power of states to regulate elections or to delegate aspects of the candidate selection process to political parties. The term "legislature" in Article I, §4 refers to the entire state lawmaking process as construed by that state. Smiley v.

Holm, 285 U.S. 355 (1932); Davis v. Hildebrant, 241 U.S. 565 (1961). As held by the Massachusetts Supreme Judicial Court, the "15% Rule" is a lawful delegation of power by the Massachusetts General Court to the Democratic Party and, as such, a part of the state lawmaking process. Langone, supra, 388 Mass. at 194, 446 N.E.2d at 48. Such a delegation by the state is sanctioned by Article I, §4. Clark v. Rose, 379 F.Supp. 73, 77 (S.D.N.Y. 1974) (three judge court) aff'd. 531 F.2d 56 (2nd Cir. 1976). See also Harris v. Conradi, 675 F.2d 1212 (11th Cir. 1982); Tansley v. Grasso, 315 F.Supp. 513 (D. Conn. 1970) (three-judge court) (upholding similar delegation by Connecticut to political parties).

(iii) The "15% Rule" Does Not Infringe Any Of The Appellants' First Or Fourteenth Amendment Rights.

As held by the Massachusetts Supreme Judicial Court and this Court in Langone, supra, the "15% Rule" does not infringe any of the appellants' First or Fourteenth Amendment rights.

A candidate has no fundamental constitutional right to run in a party primary and, potentially, to become that party's nominee. Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1982); Bullock v. Carter, 405 U.S. 134, 142-43 (1972); Walker v. Yucht, 352 F.Supp. 85, 97 (D. Del. 1972) (three-judge court); Developments in the Law: Elections, 88 Harv.L.Rev. 1111, 1176 (1975). Similarly, a voter does not have the constitutional right to

expect that a candidate to his liking will be on the ballot. Lubin v. Panish, 415 U.S. 709, 716 (1974); Walker v. Yucht, supra at 92.

Both the state and political parties may constitutionally put reasonable restrictions upon access to primary ballots and, so long as all candidates are equally subject to those requirements and have an equal opportunity to meet them, no constitutional rights of the candidates or their supporters are infringed. Clements v. Fashing, supra (inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity). See generally Developments in the Law: Elections, 88 Harv.L.Rev. 1111, 1176-77 (1975).

The "15% Rule" has, at most, an insignificant impact on appellants' constitutional rights. It does not discriminate against a discrete minority group. It does not involve a classification based on wealth. Nor does it impose a burden on new or small political parties or independent candidates. Thus, it is not subject to "strict scrutiny", and need only bear a rational relationship to a legitimate party goal. Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1982); Clough v. Guzzi, 416 F.Supp. 1057, 1066-68 (D. Mass. 1976) (three-judge court); Nader v. Schaffer, 417 F.Supp. 837, 948-49 (D. Conn. 1976) (three-judge court) aff'd 429 U.S. 989 (1976); Walker v. Yucht, 352 F.Supp. 85

(D. Del. 1972) (three-judge court). This it clearly does. 5/.

Ballot access schemes far more restrictive than those imposed by the "15% Rule" have been upheld against constitutional challenge many times, the closest case being Tansley v. Grasso, 315 F.Supp. 513 (D. Conn. 1970) (three-judge court) in which the constitutional validity of Connecticut's statutory requirement that a prospective candidate receive the support of at least twenty percent of the delegate vote in a party convention, on any

---

5/ The "15% Rule", in fact, serves the compelling party interest of assuring party members an effective role in the selection of their party's nominee, Langone, supra, 388 Mass. at 193, 446 N.E.2d at 47, and is thus constitutionally permissible even under the "strict scrutiny" standard of review. See Storer v. Brown, 415 U.S. 724 (1974).

roll-call vote, in order to qualify to run in the party primary, was unanimously upheld by the court. See also Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); and Rosario v. Rockefeller, 410 U.S. 752 (1973).

Political parties have interests parallel to those of the states, and reasonable means employed by them in furtherance of those interests which, if used by the state would be constitutionally permissible, are likewise constitutional. Restivo v. Conservative Party, 391 F.Supp. 813 (S.D.N.Y. 1975); Clark v. Rose, 379 F.Supp. 73 (S.D.N.Y. 1974) (three-judge court), aff'd. 531 F.2d 56 (2nd Cir. 1976). Indeed, a political party's regulation of ballot access is accorded

far more deference than that of a state. As noted by the court in Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) (en banc), cert. denied 424 U.S. 933 (1976):

> The [party's] primary purpose is to chart a course for the advancement of the party's ideals and it is in that light that the requirements of equal protection are to be discerned.

525 F.2d at 585, n.58. See also Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), cert. denied 404 U.S. 1019 (1972); Moritt v. Rockefeller, 346 F.Supp. 34, 38 (S.D.N.Y. 1972) (three-judge court), aff'd. 409 U.S. 1020 (1972).

As noted above, five of the seven candidates who submitted their names to the Massachusetts Democratic Party's Endorsing Convention for the

nomination to office of lieutenant governor, one of the two candidates for the Senate race, and both candidates for the gubernatorial nomination received sufficient votes to qualify for the primary. Thus, the reasonableness of the "15% Rule", and the minimal nature of its requirements, are manifest. Langone, supra, 388 Mass. at 197, 446 N.E.2d at 49.

Finally, when evaluating any of the appellants' constitutional claims (including their Art. I, §3 and Seventeenth Amendment allegations), it is important to remember that ways other than the Democratic Party nomination exist for a candidate to get his or her name on the special election ballot. Hopfmann had the opportunity at any time up until February 4, 1982 to withdraw

from the Democratic Party, declare himself an independent candidate, and enlist his supporters in an attempt to secure sufficient signatures on petitions to qualify for the November ballot. M.G.L. c.53, §6. Hopfmann's supporters retained the right to "write in" Hopfmann's name on the November election ballot, and to support other candidates who reflected their political views. M.G.L. c. 54, §§116 and 116A.

At root, under the guise of alleged "constitutional violations", appellants are asking this Court to order the Democratic Party potentially to endorse a candidate who has not satisfied the party rules and has now chosen to challenge the wishes of a majority of its regular party members. If there are constitutional rights

severely at risk, they are those of the regular Democratic Party members who, should this Court invalidate the "15% Rule", may potentially be represented in a general election by a candidate who has no significant support in the active party membership. Hopfmann chose to stay in the Democratic Party rather than become an independent. Having made that choice, he should be required to abide by the "15% Rule."

B. Appellants' Remaining Arguments are Likewise Without Merit.

(i) The "15% Rule" Does Not Add Any "Qualification" To Those Enumerated In Article I, §3 Of The United States Constitution And Thus Does Not Violate Its Provisions.

In their Jurisdictional Statement, appellants mischaracterize the "15% Rule" as a "qualification"

prohibited by Article I, §3. It is not. It is solely a rule setting a minimal restriction on who may run in the Democratic Party primary for statewide political office and potentially become the party nominee. The distinction is a critical and decisive one.

The "15% Rule" in no way renders a candidate ineligible for the office of United States Senator. He or she is free to run as an independent, a "write in" candidate, or as the candidate of another political party and, if elected and if he or she meets the "qualifications" set forth in Article I, §3, will be fully "qualified" to take office despite his or her failure to comply with the "15% Rule". A prohibited "qualification" is

something entirely different; such a "qualification" would render a candidate completely ineligible to take office even if elected by write-in vote. This critical distinction is highlighted in State v. Crane, 197 P.2d 864 (Wyo. 1948). In that case, at pages 870-71, the Wyoming Supreme Court correctly notes that the test as to whether or not a "restriction" amounts to a "qualification" within the meaning of Article I, §3 is whether or not the candidate "could be elected if his name were written in by a sufficient number of electors." 197 P.2d at 871.

If appellants' reading of Article I, §3 was correct, no ballot restriction for the office of United States Senator would be constitutionally valid. Under appellants' interpretation

of Article I, §3, for example, Massachusetts could not constitutionally require that a candidate for major party nomination for the office of United States Senator must be a member of that party, M.G.L. c. 53, §48; file a financial disclosure form with the state Ethics Commission, M.G.L. c. 53, §9; and submit nominating papers signed by at least 10,000 registered voters, M.G.L. c. 53, §§44, 46. Appellants' interpretation also ignores the rulings of the United States Supreme Court in such cases as Storer v. Brown, 415 U.S. 724 (1974), Jenness v. Fortson, 403 U.S. 431 (1971) and Rosario v. Rockefeller, 410 U.S. 752 (1973), all of which review and uphold ballot access restrictions over and above the "qualifications" set forth in Article I, §3.

(ii) The "15% Rule" Does Not Violate The Seventeenth Amendment.

Appellants' last argument, based on the Seventeenth Amendment, appeared for the first time in this litigation in their brief submitted to the First Circuit.

The Seventeenth Amendment, in relevant part, states:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

In no way does the "15% Rule" infringe this Amendment.

At the caucuses which choose delegates to its Endorsing Conventions, the Democratic Party employs precisely the same voter qualifications as does the state, with only one exception; participants at the caucuses must be registered Democrats. Every candidate

who desires the Democratic Party's nomination has precisely the same opportunity to get his supporters to those caucuses and, after the caucuses elect delegates to the Endorsing Convention, to solicit those delegates' votes. Moreover, as noted at several points in this Motion, any candidate for the office of United States Senator dissatisfied with the "15% Rule" has the opportunity to run as the candidate of another party, as an independent, or to conduct a "write-in" campaign. The qualifications of voters at the general election are not affected by the "15% Rule", nor are their votes "diluted", and all candidates, regardless of what party nomination they bear (if any), have precisely the same chance before precisely the same voters. Appellants'

argument to the contrary, Massachusetts is not a "one-party state" in which nomination by the Democratic Party is tantamount to election. Thus, appellants' belated Seventeenth Amendment arguments must be rejected.

III. CONCLUSION.

The validity of the "15% Rule" and its importance to the Democratic Party have been repeatedly upheld by the Massachusetts Supreme Judicial Court, the courts below, and by this Court. For all of the foregoing reasons, appellees Chester G. Atkins and the Democratic State Committee respectfully request that this Court affirm the judgment of the Court below and dismiss appellants' appeal for want of jurisdiction. To the extent appellants' papers are treated as a Petition for

Certiorari, appellees respectfully request that that Petition be denied.

CHESTER G. ATKINS and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS

By their attorneys,

James Roosevelt, Jr.

James H. Wexler

Keith C. Long*

HERRICK & SMITH
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9000

*Counsel of record.
Dated: April 12, 1985

CERTIFICATE OF SERVICE
UNDER RULE 28

I, Keith C. Long, counsel of record for appellees Chester G. Atkins and The Democratic State Committee of Massachusetts, do hereby certify that I am a member of the bar of this Court, and that I have served three true and accurate copies of this Motion on each of the other parties to this appeal by delivery to their counsel of record in the following manner:

By Federal Express (overnight delivery), all charges prepaid, upon Laurence A. Elgin, Esq., 2762 Woodley Place, N.W., Washington, D.C. 20008 (counsel of record for appellants).

By First Class Mail, all charges prepaid, upon Thomas R. Kiley, Esq., First Assistant Attorney General, Office of the Attorney General, One Ashburton Place, Room 2001, Boston, MA 02108.

Keith C. Long
HERRICK & SMITH
100 Federal Street
Boston, MA 02110
(617) 357-9000

Dated: April 12, 1985